Supreme Court, U.S.
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No.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PFS CORPORATION, Petitioners

v.

KENNETH B. TURNER, and
CHARLOTTE TURNER

On Petition For Writ Of Certiorari
To The Supreme Court Of Alabama
No. 1931169

PETITION FOR WRIT OF CERTIORARI

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32pp

QUESTION PRESENTED FOR REVIEW

I. ARE STATE-LAW CLAIMS AGAINST A HUD INSPECTION AGENT PREEMPTED WHEN THOSE CLAIMS ALLEGE THE AGENT'S PLAN APPROVAL WAS NEGLIGENT ALTHOUGH BASED UPON COMPLIANCE EVIDENCE PERMITTED BY HUD SAFETY REGULATIONS?

Answered by the Alabama Supreme Court: "No."

LISTING OF PARTIES INVOLVED

KENNETH & CHARLOTTE TURNER
Represented by:
Attorney James H. Starnes
Attorney Valentina Gerdts-Hughes
Roden, Hayes, Carter & Starnes
Birmingham, Alabama

PFS CORPORATION (Petitioner)
PFS Corporation is a privately held corporation with no parent company or subsidiaries.
Represented by:
Attorney Rhea A. Myers
Wheeler, Van Sickle & Anderson, S.C.
Madison, Wisconsin, and

Attorney Richard Rhea
Rhea, Boyd & Rhea
Gadsden, Alabama

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CITATION TO THE OPINION OF THE SUPREME COURT OF ALABAMA

Kenneth B. Turner v. PFS Corporation
1995 Ala. LEXIS 407; CCH Prod. Liab. Rep. P14,439

STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

This case presents a substantial Federal question concerning the preemption by HUD safety regulations of inconsistent Alabama common and statutory law. The highest court in Alabama held that preemption does not apply to the facts of this case. This case involves the transportation of a manufactured home and the extent to which the third-party inspection agency is expected to perform an independent analysis of the safety of the transportation design.

The Alabama Court returned the case to the trial court for determination of the imposition of state-law tort liability on the HUD inspector. The opinion was issued October 13, 1995. On February 16, 1996, the Alabama Supreme Court overruled the application for rehearing. There was no written decision issued on rehearing. Therefore, the jurisdiction of this Court to review the judgment of the Alabama Supreme Court exists pursuant to 28 U.S.C. § 1257 (1988) and Article III of the United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

United States Constitution: Article VI, cl. 2:

> "...and the laws of the United States which shall be made in pursuance [of the Constitution],... shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding."

42 U.S.C. § 5403(d):

> Whenever a Federal manufactured home construction and safety standard established under this chapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to

continue in effect, with respect to any manufactured home covered, any standard regarding the construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

24 C.F.R. § 3282.11 (a) and (e)

§3282.11 Preemption and Reciprocity

(a) No state manufactured home standard regarding manufactured home construction and safety which covers aspects of the manufactured home governed by the Federal standards shall be established or continue in effect with Resect to the manufactured homes subject to the Federal standards and these regulations unless it is identical to the Federal standards.

* * *

(e) No state or locality may establish or enforce any rule or regulation or take any action that stands as an obstacle to this accomplishment and execution of the full purposes and objectives of Congress. The test of whether a state rule or action is valid or must give way to whether one state rule can be enforced or the action taken without impairing the Federal superintendence of the manufactured home industry as established by the Act.

24 C.F.R. § 3280.904(a) and (b)(9)(1):

§3280.904(a)...in operation, the transportation system (supporting the manufactured home structure and its contents) shall effectively respond to the control of the towing vehicle in terms of tracking and braking, while traveling at applicable highway speeds and in normal highway traffic conditions...

* * *

(b)(9)(1) the number, type, size and design of break assemblies required to assist the towing vehicle in providing effective control and stopping of the manufactured home shall be determined and documented by engineering analysis. Those alternatives listed in §3280.903(c) may be accepted in place of such an analysis.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

On April 4, 1989, in the Circuit Court of Etowah County, Alabama, the plaintiff, Turner, filed a civil action for personal injuries he sustained on or about April 7, 1987, while transporting a mobile home for his employer, Mays Enterprises, Inc. (Mays). He brought the tort action pursuant to § 25-5-11 of the Code of Alabama. It was initially filed against the manufacturer of the braking axle used on the mobile home, a supplier of that axle and 24 fictitious party defendants. The complaint alleged the negligent manufacture, sale, design and distribution of the axle, failure to warn, breach of implied warranty, and a violation of the Alabama Extended Manufacturers strict liability doctrine.

On July 17, 1989, the plaintiff amended the complaint so as to add PFS Corporation (PFS) as a party defendant. The claim against PFS alleged the negligent approval of the design used for the transportation package at the mobile home company. Motions for Summary Judgment were filed on behalf of all other named defendants, all of which motions were granted. On January 11, 1994, PFS Corporation filed a Motion for Summary Judgment which motion was granted on March 1, 1994. The trial court determined that the HUD regulations preempted the common-law tort causes of action raised against PFS, and that absent such a cause of action, the complaint did not state a cause of action. Appendix, p. B-7. On March 28, 1994, plaintiff filed a Motion to Reconsider and Vacate Judgment, which was denied by the trial court on April 8, 1994.

The plaintiff appealed from the dismissal. Plaintiff raised two issues in the appeal. First, whether the trial court erred in holding that the Federal Regulations preempted this tort action and, if not, whether the trial court erred in finding that there was not substantial evidence to support the plaintiff's position that PFS violated the HUD standards and good engineering practices in approving the design of the braking system for the transportation of

the mobile home.

On October 13, 1995, the Supreme Court of Alabama reversed the ruling of the trial court and remanded the case to Circuit Court for trial. PFS subsequently filed a motion for reconsideration which motion was denied on February 16, 1996. There was no written opinion issued on the rehearing. Justices Shore, Almon, Ingram, Cook and Butts concurred. Hooper, C.J. and Maddox J. dissented.

SUMMARY OF HUD REGULATORY PROCESS

The specifications which govern the minimum construction details of mobile homes in general, and of Mays Industries, Inc., the manufacturer in this case, have been set by the Department of Housing and Urban Development (HUD). These regulations cover all aspects of the construction, safety and transportation of these homes and are intended to be explicitly preemptive.[1] HUD enforces

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[1] The express provision in the Manufactured Home Construction and Safety Standards Act, 42 U.S.C. § 5401 (1980), et seq.(NMHCSSA), along with the explicit HUD regulations, defines the preemptive reach of federal regulation. See Scurlock v. City of Lynn Haven, Fla., 858 F.2d 1521, 1523 (11th Cir. 1988) (holding a city ordinance preempted by 24 C.F.R. § 3282.11); Woolridge v. Redman Homes, Inc., 792 F. Supp. 1469 (N.D. Tex. 1991); Shorter v. Champion Home Builders Co., 776 F. Supp. 333 (N.D. Ohio 1991). Section 5403(d) of the NMHCSSA provides:

> Whenever a Federal manufactured home construction and safety standard established under this chapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any manufactured home covered, any standard regarding the

those specifications by promulgating its own rules and specifications for the homes. HUD does not approve the designs for the homes or inspect the manufacturing facilities itself. To assure compliance with the approved HUD minimum specifications, HUD licenses "Design Approval Plant Inspection Agencies" (DAPIA's) and "In-Plant Inspection Agencies," (IPIA's). In this case, the defendant PFS was performing the DAPIA and IPIA functions at the Mays Industries mobile home plant as an agent for HUD.

The plaintiff's claim arises from injuries he sustained when the mobile home he was transporting, as an employee of the manufacturer, Mays, failed to slow down sufficiently and he drove it into a ditch causing severe personal injury and destroying the home. The Plaintiff alleges that the transportation safety regulations promulgated by HUD should have been more strictly enforced to require greater braking capacity on the trailer which the Plaintiff was towing. The Plaintiff alleges either that the braking axle on the trailer of the home was defective in failing to stop the mobile home or, alternatively, that PFS, as a condition of its release of the HUD label for this unit, should have specified greater braking capacity, i.e., more than one braking axle on the trailer assembly. Plaintiff's claim against PFS asserts that PFS was negligent in its approval of the Mays design when that design could or should have required more braking capacity, more braking axles or an entirely different kind of system.

The PFS-Mays contractual agreement defined the design approval duties undertaken and performed by PFS for Mays Enterprises (hereinafter "Mays"). The contract regulated the use of the PFS label by Mays. Under the contract, PFS became the agent

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> construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

of the United States Department of Housing and Urban Development (HUD) for the purposes of administering the rules and regulations promulgated by HUD regarding the production and sale of mobile homes. Those contractual rules and regulations governed when, how, and under what conditions the HUD label came to be affixed in mobile homes produced by Mays under the contract. These specifications and rules were identified in paragraph 7 of the contract which states:

> Manufacturer recognizes that PFS, as IPIA, shall be responsible for conducting representative inspections to assure that the Manufacturer is performing its Quality Control Program pursuant to and consistent with its approved Quality Assurance Manual, and to assure that whatever part of a mobile home is actually inspected by the IPIA is fully in conformance with the design and, as appropriate in Section 3282.362(a)1(iii), with the standards before a label is issued for or placed on that mobile home as set forth in said rules.

Appendix, p. B-3.

The Federal standards regarding the adequacy of the braking system are set forth in 24 C.F.R. § 3280.904(a) and (b)(9)(1). Section 3280.904(a) states:

> In operation, the transportation system (supporting the manufactured home structure and its contents) shall effectively respond to the control of the braking, while traveling at applicable towing vehicle in terms of tracking and highway speeds and in normal highway traffic conditions.

Section 3280.904(b)(9)(1) states:

> Brake assemblies. (1) The number, type, size and design of brake assemblies required to assist the towing vehicle in

> providing effective control and stopping of the manufactured home shall be determined and documented by engineering analysis. Those alternatives listed in § 3280.903(c) may be accepted in place of such an analysis.

The HUD regulation concerning the design of the mobile home transportation system, 24 C.F.R. § 3280.903(c), provides that a manufacturer's transportation design may avoid using multiple brake axles on a trailer if one of the alternative approval methods allowed by § 3280.903(c) is followed. One of these manufacturing alternatives permits the manufacturer to certify in a letter that its transportation experience has "not experienced latent damage to structural, plumbing, mechanical, or electrical systems that would exceed the 1% maximum allowance allowed in § 3280.903 of the standards." PFS had received such a certification letter from Mays Manufacturing.

HUD permits a DAPIA to accept and rely on acceptable documentation of actual transportation experience to prove the effectiveness of the transportation package and, specifically, to approve the use of one braking axle on the trailer. To identify what will be deemed acceptable documentation to justify that approval, HUD has stated in Interpretative Bulletin J-1-76 that service records or other documents are acceptable documentation of actual transportation experience if the sum of: (1) failures related to chassis damage, (2) body failures due to transportation loading and (3) latent damage does not exceed 1% of the total number of units shipped for each design. The 1% maximum allowance letter referred to by the DAPIA is explicitly authorized by HUD Interpretative Bulletin J-1-76. Pointedly, this Bulletin concludes:

> If the manufacturer does not have or cannot provide actual records of latent damage history, the manufacturer shall provide a statement that, to the manufacturer's knowledge, no latent damage has occurred as a result of transportation.

Appendix, p. F-1.

The trial court held that no issue of fact existed because, as a matter of law, PFS was specifically precluded by the applicable HUD standards from requiring Mays to use any greater braking capacity than specified by the manufacturer in this instance. However, the Alabama Supreme Court ruled otherwise,

> Significantly, § 5409(c) of the NMHCSSA provides that compliance with any Federal manufactured home construction or safety standard issued under this chapter does not exempt any person from any liability under common law.... Read together, this section and § 5403(d) "preempt state law standards, but do not preempt most state law claims." (Citations omitted).

Appendix, p. D-3. The Alabama Supreme Court concluded,

> Turner's claims are not preempted, however, because enforcing the federal standards through state tort law does not frustrate federal supervision of the industry. The availability of tort claims may serve to increase compliance by the industry.

Appendix, p. D-5. Therefore, the Alabama Supreme Court has ruled that the DAPIA must answer to the standards of conduct as determined by an Alabama jury regarding the adequacy of the design approval for the transportation package on a mobile home. This standard may well be different or higher than those set by HUD in the above-described rules and bulletins.

ARGUMENT

I. THE DECISION BY THE ALABAMA SUPREME COURT CHALLENGES THE ENFORCEMENT OF FEDERAL HUD REQUIREMENTS FOR UNIFORM REGULATION IN THE MANUFACTURE OF MOBILE HOMES.

A. It Is Essential To The HUD Mobile Home Industry Program That This Court Address The Extent To Which HUD Construction And Safety Standards Explicitly Preempt Inconsistent Requirements Imposed By State Courts.

In this case, the Alabama Supreme Court held that state-law tort claims can be presented to a jury to determine the negligence of the HUD representative when that representative approved a design package which the HUD regulations specifically stated it "may accept." This decision potentially holds the DAPIA (the HUD representative) to a higher standard for design approval than required under the HUD standards which are described in the contract between the parties. Therefore, Alabama seeks to impose a stricter standard than required by HUD. If States can impose their own standards for safety, the entire uniform regulatory system is jeopardized.

In Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992), the Supreme Court undertook the task of clarifying the power of the federal government to supersede state law flowing from the Supremacy Clause of the United States Constitution.[2] The Court concluded that when Congress enacts an explicit provision on

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[2] U.S. Const. art. VI, cl. 2 ("the laws of the United States, which shall be made in pursuance [of the Constitution],... shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.") See also Joseph T. McLaughlin et al., Federal Preemption, C842 A.L.I. A.B.A. 639, 641 (1993).

preemption and that provision supplies a "'reliable indicium of congressional intent with respect to state authority,' . . . 'there is no need to infer congressional intent to preempt state laws from the substantive provisions' of the legislation." Cipollone, 504 U.S. at 517.

Where Congress has explicitly addressed the issue of preemption within the text of the statute, State law is said to be expressly preempted. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). This case held that preemption must be found if Congress' desire to regulate a field is explicit in the statute's language. This Court's review of the Alabama Court decision in this case will further the development of the law concerning federal preemption by defining the extent to which a court must defer to the explicit preemption language in order to preserve or define the Congressional intent.

B. The Alabama Holding Joins Other Lower Court Cases Which Threaten To Disrupt The Statutory Purpose Of Federal Preemption.

This Court has noted that state courts are often reluctant to find preemption when interpreting a federal statute pertaining to a subject traditionally governed by state law. CSX Trans., Inc. v. Easterwood, 507 U.S. 658, 668 (1993). Some state courts have heightened this presumption against preemption when it is felt that the Congressional preemption trespasses upon the historic police powers of the State, especially in the imposition of damage awards upon irresponsible manufacturers.[3] A recent law review article argues that, unless this Court addresses the limits of preemption, state courts will increasingly use their police powers to defeat the preemption provisions of several regulatory statutes similar to the

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[3] Forster v. R.J. Reynolds, 423 N.W.2d 691, 696 (Minn. C. App. 1988), rev'd 437 N.W.2d 655 (Minn. 1989).

HUD mobile home regulations.[4] The instant case presents an opportunity for this Court to address the boundaries between the rights of the states to determine locally the amount of "safety" they require while transporting mobile homes and the national policy goals undertaken by Congress in enacting a national preemptive process for design approval regarding these homes.[5]

The "DAPIA" design review process is an important part of HUD's purposes in enforcing the Act. If the potential State-law liability for those agents of HUD is allowed to stand, it will have profound effects throughout the industry. If there is no single set of design rules to be used by the approval agency, it simply will not be able to certify plans. If all design decisions are subject to the local

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[4] Richard J. Scislowski, Note, Jenkins v. James B. Day & Co.: A New Defense of State Tort Law Against Federal Preemption -- Is It Legitimate? 28 Akron L. Rev. 373 (1995). This Note reviewed the decision in Jenkins v. James B. Day & Co., 634 N.E.2d 998 (Ohio 1994), where the court held that the preemptive analysis which allowed state-law tort claims predicated on an inadequate warning label on a consumer product were not preempted by the Federal Hazardous Substances Act, 15 U.S.C. §§ 1261 - 1277 (1988). The Note described other federal acts also at risk of a similar interpretation.

[5] See 42 U.S.C. §5401 (1980) and § 5403(d) (1980):

> Whenever a Federal [mobile] home construction and safety standard established under this chapter is in effect, no state or political subdivision of a state shall have authority either to establish, or to continue in effect, with respect to any home covered, any standard regarding construction or safety applicable to the aspect of Performance of such home which is not identical the Federal home construction and safety standard.

tort standards, the national system of design approvals will no longer be workable. At the very least, such rules will substantially increase the cost of the homes and will probably lead to the failure of the approval system at a time when affordable housing is a priority for the country. Non-uniform enforcement of design rules will frustrate the purposes of the stated purposes of the NMHCSSA.

This Court recently ruled that an Alabama statute that purported to make pre-dispute arbitration agreements unenforceable was preempted by the Federal Arbitration Act. Allied-Bruce Terminix Companies. v. Dobson, 63 U.S.L.W. 4079 (US SupCt, April 23, 1996). Left undecided by that decision was the delineation of how the lower courts should address explicit preemption in the context of allegations of safety concerns. If not reviewed by this Court, the Alabama decision in the instant case will undercut the regulatory purpose of Congress with regard to the mobile home industry by limiting the reach of explicit preemption in the context of safety regulation.

II. THE ALABAMA DECISION CONFOUNDS THE HUD MOBILE HOME REGULATORY PROCESS BY FINDING POTENTIAL LIABILITY WHEN THE THIRD-PARTY AGENT FOR HUD WAS REQUIRED BY THE REGULATIONS TO APPROVE THE DESIGN AS PRESENTED.

A. The Statutory Framework For Manufactured Housing Is Intended To Preempt State Or Common-Law Rules That Are Not Identical To The Federal Standard.

A "federal statute may, by its terms, explicitly preempt state law." Welsh v. Century Products, 745 F. Supp. 313, 315 (D. Md. 1990) (citations omitted). The instant case involves such explicit preemption. Congress has explicitly decided that states do not have the authority to regulate the construction and transportation details involved in producing and selling mobile or "manufactured" homes. Under the Regulatory scheme, HUD licenses independent inspection companies, such as the petitioner, to certify compliance with the

HUD minimum building and transportation requirements. These federal administrative regulations have the same preemptive effect as do federal statutes. Welsh, 745 F. Supp. at 314-15.

The specific federal regulation relied upon by PFS in this action provides in pertinent part:

> 42 C.F.R. § 3282.11 Preemption and Reciprocity.
> (a) No state manufactured home standard regarding manufactured home construction and safety which covers aspects of the manufactured home governed by the Federal standards shall be established or continue in effect with Resect to the manufactured homes subject to the Federal standards and these regulations unless it is identical to the Federal standards.
> * * *
> (e) No state or locality may establish or enforce any rule or regulation or take any action that stands as an obstacle to this accomplishment and execution of the full purposes and objectives of Congress. The test of whether a state rule or action is valid or must give way to whether one state rule can be enforced or the action taken without impairing the Federal superintendence of the manufactured home industry as established by the Act.

The 11th Circuit has commented on the purpose of this Federal standard in Scurlock v. City of Lynn Haven, Florida, 858 F.2d 1521 (11th Cir., 1988). In this case, the Municipal Code for the City of Lynn Haven, Florida, was held to be preempted by the HUD regulations. The Lynn Haven, Florida, Municipal Code intended to restrict sales of manufactured homes in areas not zoned as mobile home parks unless a special seal was issued by a state agency. The Scurlock mobile homes met all applicable "HUD standards" but did not have the required local seal. The 11th Circuit, in addressing the preemption issue, and finding the local ordinance preempted, stated:

> As in all matters of statutory construction, preemption, which has its roots in the Supremacy Clause, is a matter of congressional intent.

Id. at 1522, quoting Gushke v. City of Oklahoma City, 763 F.2d 379, 383 (10th Cir. 1985).

Congress can require that state law be preempted on the face of the statute, in legislative history or in regulations. The court in Scurlock at 1523 stated:

> In this case Congress has expressly defined the preemption reach of the Act.: 'Whenever a Federal [mobile] home construction and safety standard established under this chapter is in effect, no state or political subdivision of a state shall have authority either to establish, or to continue in effect, with respect to any home covered, any standard regarding construction or safety applicable to the aspect of Performance of such home which is not identical the Federal home construction and safety standard.' 42 U.S.C. § 5403(d). The language of the statute clearly precludes states and municipalities from imposing construction and safety standards upon mobile homes that differ in any respect from those developed by HUD.

Scurlock, 858 F.2d at 1523, citing Howard v. Uniroyal, Inc., 719 F.2d 1152, 1556 (11th Cir. 1983).

B. The Federal Preemptive Rules Set Forth Minimum Requirements For Approval And, When Mays Met Those Minimum Requirements, PFS Was Required To Approve The Design Package.

The specific requirements for designing a transportation system to deliver a mobile home are found in subpart J of the HUD

regulations, called: "Transportation" which is contained in 24 C.F.R. § 3280.904. In pertinent part, the transportation requirements are as follows:

> §3280.904(a)...in operation, the transportation system (supporting the manufactured home structure and its contents) shall effectively respond to the control of the towing vehicle in terms of tracking and braking, while traveling at applicable highway speeds and in normal highway traffic conditions...
>
> (b)(9)(1) the number, type, size and design of brake assemblies required to assist the towing vehicle in providing effective control and stopping of the manufactured home shall be determined and documented by engineering analysis. Those alternatives listed in §3280.903(c) may be accepted in place of such an analysis.

Section 3280.903(c) provides as follows:

> In place of an engineering analysis, either of the following may be accepted: (1) documented technical data of suitable highway tests which were conducted to simulate transportation loads and conditions; or (2) acceptable documented evidence of actual transportation experience which meets the intent of this subpart.

The regulatory standard, therefore, with regard to the braking capacity of the design unit requires design approval either (1) when an engineering analysis is performed or (2) when one of the alternatives described above are chosen by the manufacturer. In the instant case, the manufacturer chose the option which was "acceptable documented evidence of actual transportation experience which meets the intent of this subpart." The HUD regulations allowed manufacturers to rely on their transportation experience as one acceptable method to establish proof of safe transportation methods. The DAPIA is not permitted to second-guess this

declaration by the manufacturer. If the manufacturer's certification of its successful transportation experience is sufficient for the HUD standards, the DAPIA cannot set higher goals. The instant decision destroys this HUD regulatory method by potentially imposing a higher duty on the inspector than that required by HUD itself.

A review of this decision will clarify the law with regard to the rights of states to impose additional safety requirements. As recently as April 23, 1996, the Department of Transportation Federal Highway Administration (FHWA), and the HUD office of the Federal Housing Commissioner issued a joint notice of proposed rulemaking.[6] The proposed regulations would permit the overloading of tires used to transport mobile homes. The proposed change, however, does not require any additional methods of assuring safe transportation. In fact, the "Federalism Assessment" described in Section XII of the proposed rule, pursuant to Exec. Order No. 12612, 52 Fed. Reg. 41685 (1987), reprinted in 5 U.S.C. § 601 (1994), concluded that there will be no direct effect on States.[7] If the instant decision of the Alabama Supreme Court is not

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[6] See 61 Fed. Reg. 18014 (1996), issued April 23, 1996, affecting 49 C.F.R. Part 393, and 24 C.F.R. Part 3280. The notice described a proposed rule regarding manufactured home tires, parts and accessories necessary for safe operation. The rules would continue to allow the manufacturer to submit documented evidence of transportation experience to meet the safety criteria.

[7] "The General Counsel of HUD, as the Designated Official under Section 6(a) pursuant to Exec. Order No. 12612, 52 Fed. Reg. 41685 (1987), reprinted in 5 U.S.C. § 601 (1994), has determined that the policies contained in this rule will not have substantial direct effects on States or their political subdivisions, or the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. As a result, the rule is not subject to review under the Order.

reviewed, an Alabama jury could potentially determine whether such loading is permitted in that state. If the instant decision is not reviewed, States and municipalities will certainly be affected in the future as the lower courts and lawmakers will be able to assert local rules and control over the means of delivering these homes. The result will be a chaos of rules and liability contrary to the intent of Congress.

C. The Alabama Decision Would Require The DAPIA To Make Independent Judgments Concerning "Good Engineering Practice" Which Would Destroy The Objectivity Required Of Third-Party Inspection Agencies.

The Plaintiff wishes to introduce evidence of local experts concerning "engineering practice" in the design of the transportation chassis at the Mays plant. Such issues could well involve the factual questions of the negligence of the **designers** of the product regarding the safety of those transporting the Mays mobile homes. However, this Court should review this case to preserve the uniform standards mandated by Congress in enacting the MNHCSSA. The proper review of the case is not "how safe" is the design, but whether the DAPIA for HUD will be held responsible to review those designs for issues beyond the compliance with the HUD standards and regulations cited above.

When the plaintiff, Turner, seeks protection under the standard for minimum braking capacity on the trailer he pulls, he looks directly to the safety aspects of § 3280.904 and the statute's statement that the design approval agency "may" accept a transportation experience letter from the manufacturer as evidence of the required compliance with the safety mandate of § 3280.904. In this case the plaintiff has argued that PFS should have required a more stringent standard or could have told the manufacturer -- despite its DAPIA contract -- that it must use more than one braking axle. To require PFS, or any DAPIA to decide **how safe** the brakes

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61 Fed. Reg. 18022 (1996).

must be would create new rules to be administered by the DAPIA independently.

The grant of certiorari for this case would allow this Court to delineate the parameters for the state court litigation of the safety design issues that are covered by the federal standard. In this case, 24 C.F.R § 3280.904 is titled "**specific requirements for designing the transportation system.**" The safety of the vehicle while traveling on the highways is the explicit intention of the statute. Section 904 specifically allows the transportation experience of the manufacturer to meet the intent of the subpart. Therefore, this Court should protect the intention of Congress to preempt any contrary state rules regarding the safety and transportation of the mobile home with regard to the braking characteristics which are made a part of the design approval package.

Plaintiff and the Alabama Supreme Court would impose safety standards for braking capacity greater than required by the HUD regulations. This implies a duty on the part of the certifying agency to impose its own notions of safety beyond those set forth in the standards as acceptable minimums. This case can help the Court to define the preemptive reach of safety regulations.

The Alabama Court would avoid preemption by opining that Congress did not explicitly preempt actions based on state tort law. This argument misses the point and presents an issue of important federal law for clarification by this Court. Congress explicitly preempted state actions to regulate the safety of the transportation of the homes. Stricter state regulation was, in the determination of Congress, therefore, forbidden. It makes no difference whether that state regulation is by statute, rule, or, as is the case with the plaintiff's argument, by state tort law.

Therefore, the clear language and intent of § 3282.11 was designed to prevent the establishment, even by judicial decision and an award of damages, of a stricter or different state standard for the transportation safety of mobile homes. That intent has been thwarted by the Alabama Supreme Court, and as described above,

by other courts in similar statutory schemes. The plaintiff seeks an opportunity to convince a jury that stricter safety standards should be imposed by the HUD inspector than those in the Federal regulations. This Court should address the issue by granting certiorari in this case.

The rights of States to protect their citizens with common law suits and the governmental interest in the preemption of inconsistent rules should be clarified in this case. The Plaintiff wishes to introduce evidence of engineering practices concerning the design of the transportation chassis. However, it is inappropriate for the Alabama Court to be involved in that determination because the only issue which remains is whether PFS, as the DAPIA, had a responsibility to review those designs for anything beyond compliance with the HUD standards and regulations cited above. In deciding that there was a cause of action in tort, the Alabama Court has extended the cause of action in tort directly into the Federal safety regulations.

III. THE ALABAMA COURT DECISION DISTORTS THE RELATIONSHIP BETWEEN PREEMPTION AND THE ASSUMPTION OF CONTRACTUAL DUTIES RECENTLY ADDRESSED BY THIS COURT.

Although not cited by the Alabama Supreme Court, in American Airlines, Inc. v. Wolens, 115 S.Ct. 817 (1995), this Court further distinguished between common law causes of action and the reach of preemptive federal schemes of law. Congress has attempted to balance airline industry regulation and the economic viability of that industry for many years. Until 1978, the airline industry was governed by the Federal Aviation Act of 1958 (FFA)[8]. The deregulation of the industry in part was enacted by Congress in

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[8] Pub. L. No. 85-726, 72 stat. 731 (1958) (codified as amended at 49 U.S.C.), repealed in part by Pub. L. No. 103-272, 108 stat. 745 (1994).

the Airline Deregulation Act (ADA)[9]. The ADA contains a detailed preemption provision which holds,

> No state...shall enact or enforce any law, rule, regulation, standard, or other provision having to force and effect of law relating to rates, routes or services of any air carrier.

49 U.S.C. App. § 1305(a)(1) (1988), (repealed by Pub. L. 103-272, 108 stat. 745 (1994) (replaced in substance by 49 U.S.C. § 41, 743(b)(1)).

This Court's holding in Wolens that state-imposed regulation of air carriers is preempted by the ADA, while enforcement of certain contract terms that the parties set themselves is not preempted, is implicated in the instant case. The result is shown by the confusion experienced by the Supreme Court of Alabama in interpreting HUD's legislative intent. This Court's distinction in Wolens between the plaintiffs' Consumer Fraud Act Claims (CFAC) and their contract claims relied on a distinction between state-imposed and self-imposed regulation. The Alabama Supreme Court in the instant case has misconstrued such a distinction when it held that the purpose of the HUD safety regulations themselves could be modified by the Alabama Common Law in a tort action while ignoring the contractual arrangement between PFS and the manufacturer which was limited to compliance with HUD regulations, and not the provision of engineering advice concerning transportation safety. Therefore, by taking this case, the Court can complete the analysis begun in Wolens to explain the interrelationship between contractual obligations and preemptive safety regulations.

This Court concluded that for preemption purposes there must

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[9] Pub. L. No. 95-504, 92 stat. 1705 (1978) (codified as amended at 49 U.S.C.), repealed in part by Pub.L. No. 103-272, 108 stat. 745 (1994).

be a clear distinction between "what the state dictates and what the airline itself undertakes." Wolens, 115 S.Ct at 826. The Court required that in order to avoid an explicit preemption clause such as found in the ADA, the reviewing Court must look to the "self-imposed obligations" which the Court reasoned merely holds the parties to their agreement and promotes economic efficiency. Id. at 824 (citing Richard Posner, Economic Analysis of Law, 90-91 (4th 1992). In Wolens, the majority of the Court described the preemption provision as a means to prevent state regulation of the airline industry in accordance with the purpose of the ADA. Id at 821. Therefore, the plaintiff's action under the Illinois Consumer Fraud Act, was interpreted to reduce the ability of Congress to regulate the airline industry's provision of benefits to its customers.

The Alabama Supreme Court has extended the reach of the Wolens case by holding that the HUD preemption provision does not preclude claims based upon the inspector's failure to require more brakes than the HUD regulation. The Alabama Court decision, if allowed to stand, completes a significant shift of political power to the state. Such a shift places the Alabama Supreme Court in the role of the creator of a law which magnifies the impact of the HUD regulation and applies that impact unfairly on the agent for HUD. This extension of the analysis of Wolens made by the Alabama Supreme Court is at odds with the separation of powers outlined in the U.S. Constitution.[10] Under this reasoning, this magnification of judicial power need not be limited to the HUD rule making process but could extend to the airline industry in a similar misconception of the Wolens decision.[11]

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[10] U.S. Const. Art. III § 1.

[11] See, John T. Delacourt, Federal Preemption of State Consumer Law Regulations: American Airlines v. Wolens, 115 S.Ct. 817 (1995) 18 Harv. J.L. and Public Policy 903 (1995).

The second adverse consequence of this Alabama decision which flows from the Court's determination in Wolens is a blurring of the line between contract causes of action and regulation. This Court should address the line between a contractual assumption of duty and the prohibited regulatory preemption described in Wolens in order to harmonize and clarify the law. It is true that all causes of action are not preempted by the HUD regulations. For example, if the inspector failed to ensure compliance with the minimum requirements, it should be held responsible in a state tort action. However, the Alabama Court failed to perceive the difference between approving a design to minimum standards and requiring greater safety through the imposition of tort liability for engineering judgments beyond the contractual responsibility undertaken by the inspector. The consequence of this Court's failing to address the difference between preemption and freedom of contract could reflect upon each of the lines of preemption cases.

IV. THE ALABAMA COURT'S DECISION EXTENDS THE HOLDING IN FREIGHTLINER CORP. V. MYRICK TO ALLOW IMPERMISSIBLE STATE REGULATION OF THE MOBILE HOME INDUSTRY.

This Court's recent decision with regard to preemption, Freightliner Corp. v. Myrick, 115 S.Ct. 1483 (1995), analyzed preemption in the field of motor vehicle transportation. The National Traffic And Motor Safety Act of 1966, 15 U.S.C. §§ 1381 - 1431 (Safety Act), was held not to preempt the plaintiff's tort claims based on the defendant's failure to install an anti-lock breaking system (ABS) in tractor trailers. In Myrick, the Supreme Court did not directly address all of the issues the litigants face involving defective restraint systems (i.e. seat belts and air bags) but did hold that manufacturers could be sued for failing to install ABS. In doing so, the Court rejected the manufacturer's contention that because the government had not required ABS, the plaintiff would be preempted from bringing tort actions against the manufacturer. This case, however, was not based upon explicit preemption but implicit preemption. Myrick, 115 S.Ct. at 1488. The Safety Act's failure to require specific equipment was held not to preempt the

state from bringing suits requiring manufacturers to install safer equipment.

The Alabama Supreme Court has extended the Court's decision in Myrick from a finding of potential liability for the **manufacturer** to finding liability for the **inspection agent** of the government. This is an extension of the preemption analysis beyond that of the earlier cases cited with regard to preemption. This extension of the preemption analysis to allow actions against the agent of the government, should be addressed by this Court and the law clarified in this regard.

The preemption analysis undertaken by the Alabama Supreme Court lacks a consideration of the required balance between competing Federal and State interests. It broadens the scope of review beyond the statute in question and, therefore, uses the United States Supreme Court preemption cases to destroy the necessary predictability of standards for manufacturers and third-party agents. This Court should address the Alabama Supreme Court opinion to allow express preemption language to reflect the regulatory intention of Congress.

VI. CONCLUSION

This Court should address the preemption language of the HUD regulations in order to clarify the scope of preemptive federal legislation. The Alabama Court failed to correctly interpret the HUD regulations which restrict the role of third inspectors to certifying compliance with HUD regulations. The Alabama Court should not extend the liability of these third-party inspectors to other standards of safety and engineering. The present holding precipitates a failure to provide independent review by the third-party agents anticipated under the HUD regulations.

The instant case presents an issue lying in the void between the Court's decision to grant broad effect to the ADA's preemption provision in Wolens and the limited preemptive effect of the anti-lock brake claims in Myrick. The inevitable tug-of-war between

these two cases is already apparent in the instant case and will continue to draw state and federal courts into an indecisive battle over the meaning and extent of explicit preemptive clauses in other Federal Laws. The petitioner, the mobile home industry and the consumers of their products already lie in that cross-fire. Additionally, the potential for the further confusion in other industries regulated by federal laws makes this a compelling case for review at this time.

Dated this 16th day of May, 1996.

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